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10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
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13 NANCY TARSHA,

14 Plaintiff,

15 v.

16
17 BANK OF AMERICA, N.A.;
18 MORTGAGE ELECTRONIC
19 SYSTEMS, INC.; LANDSAFE, INC.;
20 RICARDO RODRIGUEZ, an
individual; and DOES 1-100 inclusive,

21 Defendants.
22

CASE No: 11-CV-928 W (MDD)

**ORDER (1) GRANTING
DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE [DOC. 25-2];
AND (2) GRANTING
DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT [DOC.
25]**

23 Pending before the Court is Defendants Bank of America, N.A., Mortgage
24 Electronic Systems, Inc. ("MERS"), and Landsafe, Inc.'s motion to dismiss Plaintiff's
25 Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6).¹ (MTD
26 [Doc. 25].) Defendants also request judicial notice of nine documents attached to their
27

28 ¹ Defendant Ricardo Rodriguez joins in the motion. (*Rodriguez Joinder* [Doc. 26].)

1 motion. (*Defs.’ RJN* [Doc. 25-2].) Plaintiff Nancy Tarsha opposes. (*Pl.’s Opp’n* [Doc.
2 27].) The Court decides the matter on the papers submitted and without oral argument
3 pursuant to Civil Local Rule 7.1(d)(1). For the reasons below, the Court **GRANTS**
4 Defendants’ request for judicial notice, and **GRANTS** Defendants’ motion.

5 6 **I. BACKGROUND**

7 In 2000, Plaintiff Nancy Tarsha leased a parcel of property on Cox Road in San
8 Marcos, California. (*Second Amended Compl. “SAC”* [Doc. 24] 5.) The lease gave
9 Tarsha an option to purchase the property at the end of a three-year term. (*Id.*) A
10 horse trainer by trade, Tarsha used the Cox Road property as a personal residence and
11 a boarding facility for her horses. (*Id.*) In April 2004, Tarsha obtained a mortgage loan
12 to purchase the Cox Road property for \$1,250,000. (*Id.*)

13 In early 2005, Tarsha was approached by Defendant Ricardo Rodriguez, a home
14 loan consultant for Countrywide Home Loans, Inc. (“Countrywide”),² about refinancing
15 her mortgage on the Cox Road property. (*Id.*) Following Rodriguez’s solicitation,
16 Tarsha subdivided the Cox Road property into two parcels: 390 Cox Road and 424 Cox
17 Road. (*Id.* at 5-7) Over the next year, Tarsha entered into seven different transactions
18 with Countrywide, all executed by Rodriguez (collectively, “transactions”):

- 19
20 1. On April 27, 2005, Tarsha refinanced the 424 Cox Road parcel with a
21 \$608,000 adjustable-rate loan from Countrywide. (*Id.* at 5-6; SAC Exs. 1,
22 2.)
- 23 2. On May 27, 2005, Tarsha obtained a \$55,000 line of credit on the 390
24 Cox Road parcel through Countrywide. (SAC 8.)
- 25 3. On May 31, 2005, Tarsha refinanced the 390 Cox Road parcel with a
26 \$825,000 jumbo loan from Countrywide. (SAC 7; SAC Ex. 3.)

27
28 ² Tarsha sues Bank of America as successor-in-interest to Countrywide. (SAC 18.)

- 1 4. On August 9, 2005, Tarsha refinanced the 424 Cox Road parcel, this time
2 with a \$610,000 loan from Countrywide. (SAC 9; SAC Ex. 5; Defs.' RJN
3 Ex. F.) Countrywide's interest was secured by a deed of trust on the 424
 Cox Road property, recorded August 16, 2005. (*Id.*)
- 4 5. On September 22, 2005, Tarsha obtained a \$148,500 line of credit on the
5 424 Cox Road parcel through Countrywide. (SAC 11; Defs.' RJN Ex. G.)
6 Countrywide's interest was again secured by a deed of trust on the
 property, recorded September 22, 2005. (*Id.*)
- 7 6. On December 22, 2005, Tarsha refinanced the 390 Cox Road parcel with
8 a \$910,000 adjustable-rate loan from Countrywide. (SAC 12; Defs.' RJN
9 Ex. A.) Countrywide's interest was secured by a deed of trust on the
10 property, recorded December 29, 2005. (*Id.*)
- 11 7. Finally, on January 30, 2006, Tarsha obtained a \$188,500 line of credit on
12 the 390 Cox Road parcel through Countrywide. (SAC 13; Defs.' RJN Ex.
13 B.) Countrywide's interest was again secured by a deed of trust, recorded
 February 1, 2006. (*Id.*)

14 Tarsha maintains that each transaction above was procured by fraud on
15 Rodriguez's part. (See SAC 5-12) For instance, Rodriguez repeatedly inflated Tarsha's
16 income on loan and line-of-credit applications in order to secure approval. (*Id.*; SAC
17 Exs. 1, 8, 13.) Rodriguez reported Tarsha's monthly income as \$27,000, a figure that
18 she contends she has never made. (SAC 7.) Tarsha also alleges that Rodriguez
19 knowingly failed to document her extensive liabilities and inflated the value of her
20 properties on certain loan applications. (*Id.*) Finally, Tarsha contends that Rodriguez
21 consistently failed to provide her with disclosures required by federal law throughout
22 the various transactions. (*Id.* at 5-12.)

23 Ultimately, Tarsha believes that Rodriguez induced her into repeated
24 transactions for the sole purpose of generating fees for himself and other Countrywide
25 affiliates, such as Landsafe. (See, e.g., *id.* at 7-8.) Although Rodriguez assured Tarsha
26 that refinancing would help her stay in her home, each transaction only made her worse
27 off: she incurred substantial pre-payment penalties with each refinance, she received
28 no cash payouts as a result of the refinance and line-of-credit transactions, her total

1 indebtedness to Countrywide increased with each transaction, and the term of her
2 indebtedness was only extended further into the future. (*Id.* at 5-12.)

3 In early 2008, Tarsha defaulted on her 424 Cox Road mortgage (transaction four
4 above). (SAC 22.) Recontrust, the trustee identified on each deed of trust executed
5 on behalf of Countrywide, recorded a notice of default and election to sell on May 27,
6 2008. (*Defs.’ RJN Ex. H.*) On September 3, 2008, Recontrust recorded a notice of
7 trustee’s sale on the 424 Cox Road property. (*Defs.’ RJN Ex. I.*) Soon after, Tarsha also
8 defaulted on her 390 Cox Road mortgage (transaction six above). (*Defs.’ RJN Ex. D.*)
9 On February 20, 2009, Recontrust recorded a notice of default for that property as well.
10 (*Id.*) Tarsha entered into Chapter 13 bankruptcy protection in August 2010, and was
11 discharged on March 9, 2011. (SAC 15.) Tarsha filed her instant action in this Court
12 on April 30, 2011. (*See Compl.* [Doc. 1].)

13 On February 10, 2012, Tarsha filed her FAC in the instant case. (*See FAC.*)
14 Tarsha asserted ten causes of action: (1) fraud - intentional misrepresentation; (2) fraud
15 - negligent misrepresentation; (3) breach of fiduciary duty; (4) violation of the Truth
16 in Lending Act (“TILA”); (5) violation of the Real Estate Settlement Procedures Act
17 (“RESPA”); (6) violation of the Fair Debt Collection Practices Act (“FDCPA”) and
18 California’s Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”); (7)
19 violation of California’s Unfair Competition Law (“UCL”); (8) breach of implied
20 covenant of good faith and fair dealing; (9) wrongful foreclosure; and (10) quiet title.
21 (*Id.*) Tarsha also sought equitable tolling on the applicable statutes of limitation and
22 requests arbitration/mediation of her substantive claims. (*Id.* at 33-36, 39.) Defendants
23 moved to dismiss each of Tarsha’s claims. (*See Mot. Dismiss FAC* [Doc 18].)

24 On June 28, 2012, the Court granted in part and denied in part Defendants
25 motion to dismiss the FAC, and granted Tarsha leave to amend. (*See Order* [Doc. 23].)
26 On August 8, 2012, Tarsha filed her Second Amended Complaint asserting the same
27 causes of action listed above. (*See SAC* [Doc. 24].) Defendants again move to dismiss
28 each of Tarsha’s claims. (*See MTD.*)

1 II. LEGAL STANDARD

2 Courts must dismiss a cause of action for failure to state a claim upon which relief
3 can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6)
4 tests the complaint's sufficiency. See *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d
5 1480, 1484 (9th Cir. 1995). A complaint may be dismissed as a matter of law either for
6 lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
7 *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In ruling on the
8 motion, a court must "accept all material allegations of fact as true and construe the
9 complaint in a light most favorable to the non-moving party." *Vasquez v. L.A. Cnty.*,
10 487 F.3d 1246, 1249 (9th Cir. 2007).

11 However, the courts are not "required to accept as true allegations that are
12 merely conclusory, unwarranted deductions of fact, or unreasonable inferences."
13 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "While a
14 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
15 allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
16 requires more than labels and conclusions, and a formulaic recitation of the elements
17 of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).
18 Instead, the allegations in the complaint must "contain sufficient factual matter,
19 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*
20 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "The plausibility
21 standard is not akin to a 'probability requirement,' but it asks for more than a sheer
22 possibility that a defendant has acted unlawfully." *Id.*

23 Generally, courts may not consider material outside the complaint when ruling
24 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d
25 1542, 1555 n.19 (9th Cir. 1990). However, courts may consider documents specifically
26 identified in the complaint whose authenticity is not questioned by parties. *Fecht v.*
27 *Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on other
28 grounds). Moreover, courts may consider the full text of those documents, even when
the complaint quotes only selected portions. *Id.* Courts may also consider material

properly subject to judicial notice without converting the motion into one for summary judgment. Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994) (citing Mack v. S. Bay Beer Distribs., Inc., 798 F.2d 1279, 1282 (9th Cir. 1986), *abrogated on other grounds by* Astoria Fed. Sav. and Loan Ass'n v. Solimino, 501 U.S. 104 (1991)).

III. DISCUSSION

A. Defendants' Requests for Judicial Notice

Defendants seek judicial notice of nine documents, including recorded deeds of trust and notices of default or trustee's sale associated with the 390 Cox Road and 424 Cox Road properties. (*Defs.' RJN.*) Tarsha does not oppose. The Court may take notice of facts that are "not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2). Because each of Defendants' documents is a matter of public record, the Court takes notice of each of them. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006).

B. Defendants' Motion to Dismiss

Defendants have moved to dismiss each claim alleged in Tarsha's SAC. (*See MTD.*) Because Tarsha has again not opposed dismissal of her causes of action for wrongful foreclosure and quiet title, the Court **GRANTS** Defendants' motion to dismiss with respect to these claims **WITH PREJUDICE**. Tarsha's remaining claims are considered below.

1. *Fraud & Negligent Misrepresentation*

In her first and second causes of action, Tarsha alleges that Rodriguez and Countrywide defrauded her by making false statements of material fact in each of the seven transactions discussed above. (SAC 23-29.) Specifically, Rodriguez falsely

1 inflated Tarsha's income to secure approval of each transaction, mislead Tarsha about
2 the prepayment penalties and closing costs she suffered with each refinancing, and
3 assured her that refinancing would keep her in her home. (*Id.* at 24-25, 27-28.)
4 Defendants contend that Tarsha's fraud and negligence misrepresentation claims are
5 time-barred and otherwise inadequately pled. (MTD 6-9.)

6 The statute of limitations on fraud and negligent misrepresentation claims under
7 California law is three years. Cal. Code Civ. P. § 338(d); see Wilson v. Century 21
8 Great W. Realty, 15 Cal. App. 4th 298, 306 (1993) ("Negligent misrepresentation is a
9 species of fraud."). Under California Code of Civil Procedure § 338(d), a cause of
10 action for fraud or negligent misrepresentation does not accrue, however, until the
11 aggrieved party *discovers* "the facts constituting the fraud or mistake." This so-called
12 discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has
13 reason to discover, the cause of action." Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th
14 797, 807 (2005); Sun 'n Sand, Inc. v. United Cal. Bank, 21 Cal. 3d 671, 350 (1978).

15 "In order to rely on the discovery rule for delayed accrual of a cause of action,
16 [a] plaintiff whose complaint shows on its face that his claim would be barred without
17 the benefit of the discovery rule must specifically plead facts to show (1) the time and
18 manner of discovery *and* (2) the inability to have made earlier discovery despite
19 reasonable diligence." Fox, 35 Cal. 4th at 808 (emphasis added); Taguinod v. World
20 Sav. Bank, FSB, 755 F. Supp. 2d 1064, 1071 (C.D. Cal. 2010) (applying Fox to a federal
21 complaint); see also Cervantes v. City of San Diego, 5 F.3d 1273, 1277 (9th Cir. 1993)
22 (explaining that equitable tolling may only be applied if plaintiff's complaint
23 "adequately alleges facts showing the potential applicability of the equitable tolling
24 doctrine"). In other words, the plaintiff must plead facts demonstrating that "he was
25 not negligent in failing to make the discovery sooner." Sun 'n Sand, 21 Cal. 3d at 702.
26 Although "resolution of the statute of limitations is normally a question of fact," a
27 plaintiff's allegations may also be so deficient as to warrant dismissal at the pleading
28

1 stage. Fox, 35 Cal. 4th at 810; Sun n' Sand, 21 Cal. 3d at 702 (declining to apply
2 discovery rule on the pleadings alone).

3 Each allegedly fraudulent transaction entered into between Tarsha and
4 Countrywide occurred in 2005 or 2006, more than three years before she filed her
5 original complaint in April 2011. (SAC 5-12; *Compl.*) Tarsha alleges that she did not
6 discover Defendants' alleged wrongdoing until she received a Forensic Audit Report
7 and the letter from Defendant on March 22, 2010 and May 14, 2010, respectively.
8 (SAC ¶¶ 30, 67, 74, 83.) At this stage of the proceedings, this is sufficient to establish
9 the time and manner of discovery, satisfying the first prong of the discovery rule. At
10 issue here is the second prong of the discovery rule, namely, Tarsha's alleged inability
11 to have made this discovery earlier. Defendants argue that Tarsha's SAC is nearly
12 identical to her previously dismissed FAC and introduces no new allegations supporting
13 her exercise of reasonable diligence to make the discovery sooner. (MTD 6.) Tarsha
14 contests Defendants' characterization of her SAC, and cites various reasons why her
15 discovery was delayed. (*Opp'n* [Doc. 27] 22-25.)

16 Tarsha first contends that her delay was reasonable because her loans were too
17 complex for her to understand without assistance. (SAC ¶ 26 (arguing Tarsha
18 attempted to "unravel the maze of loans" she had acquired but soon realized she "lacked
19 the experience and ability to understand what went on with her loans).) Indeed,
20 Tarsha argues that she never even considered looking into the validity and legality of
21 the various transactions until the first notice of default was issued to her by Recontrust
22 on September 3, 2008. (*Id.* at ¶ 25.) A reasonable person in Tarsha's situation would
23 have inquired into the legitimacy of the transactions far before the issuance of the
24 notice of default, given the sheer volume of transactions executed in only 10 months
25 and the high value of the loans and credit lines. (SAC ¶¶ 1, 5-12; *Order* [Doc. 23] 8.)
26 Moreover, a reasonable person would have inspected the loans' material terms upon
27 signing, or at minimum, after receiving the loan documents. See Rey v. OneWest Bank,

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1 FSB, 2013 WL 127839, * 5 (E.D. Cal. January 6, 2013) (Citing Tiqui v. First National
 2 Bank of Ariz., 2010 WL 1345381, *6 (S.D.Cal. April 5, 2010).

3 Tarsha next insists that her delay was reasonable because Defendants' actions
 4 delayed her discovery. (SAC at ¶ 26 (insisting that she continued her "discovery
 5 efforts" by calling Countrywide and Bank of America, but was further delayed by these
 6 Defendants giving her the "run-around"); *Opp'n* at 23 (citing *Tarsha Decl.* [Doc. 24-
 7 3]) (arguing Tarsha had "no reason to believe that" her loan applications were
 8 inaccurate because she implicitly trusted Mr. Rodriguez and was continually reassured
 9 that Defendants were acting in her best interest).) First, the alleged "run-around" she
 10 received does not account for her delay in verifying the legality of the transactions from
 11 the time she entered into the transactions in 2005 and 2006 to September 3, 2008,
 12 when she received the notice of default. Second, a reasonable person would not be
 13 "compelled" to "implicitly trust" Mr. Rodriguez to "take care of everything." (SAC at
 14 ¶ 53.) This is especially true since a reasonable person would not trust a loan officer
 15 who claimed that he could process loan applications without the applicant's review or
 16 signature. (*Id.*)

17 Finally, Tarsha suggests that she was incapacitated and unable to pursue her
 18 investigation due to her depression. (*Id.* at ¶ 26; *Tarsha Decl.* [Doc. 24-3] ¶¶ 13, 14.)
 19 Because Tarsha alleges that this incapacitation occurred in 2009, it does not explain her
 20 delay in discovering the alleged fraud from the time she entered into the transactions
 21 in 2005 and 2006 until 2009. (*Id.* at ¶ 26.)

22 When viewed in the context of her SAC as a whole, these allegations do not
 23 support application of the discovery rule. Instead, the SAC demonstrates that Tarsha's
 24 failure to discover Defendants' alleged fraud within the three-year statute of limitations
 25 period was attributable to her own negligence. See Sun 'n Sand, 21 Cal.3d at 702.

26 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
 27 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
 28

1 the Court **GRANTS** Defendants' motion to dismiss Tarsha's claims for fraud and
 2 negligent misrepresentation **WITH PREJUDICE**.

3
 4 **2. Breach of Fiduciary Duty**

5 In her third cause of action, Tarsha alleges that Defendants breached their
 6 fiduciary duty to her by (1) inducing her into the various transactions for the sole
 7 purpose of generating fees, (2) failing to disclose the potential "adverse consequences"
 8 of participating in each loan, and (3) failing to modify her loans in compliance with the
 9 federal Making Home Affordable Refinance program. (SAC 30-31.) Defendants
 10 contend that Tarsha's third claim is time-barred as to the loan-origination allegations
 11 and fails to establish a fiduciary relationship as to her loan-modification allegations.
 12 (MTD 9-10.)

13 As its name implies, a cause of action for breach of fiduciary duty requires, at the
 14 very least, a fiduciary relationship. Pierce v. Lyman, 1 Cal. App. 4th 1093, 1101 (1991).
 15 "A fiduciary or confidential relationship can arise when confidence is reposed by
 16 persons in the integrity of others, and if the latter accepts or assumes to accept the
 17 confidence, he or she may not act so as to take advantage of the other's interest without
 18 that person's knowledge or consent." Id. at 1101-02. "As a general rule, a financial
 19 institution owes no duty of care to a borrower when the institution's involvement in the
 20 loan transaction does not exceed the scope of its conventional role as a mere lender of
 21 money." Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1096
 22 (1991); Oaks Mgmt. Corp. v. Sup. Ct., 145 Cal. App. 4th 453, 466 (1991).

23 Tarsha has still not demonstrated that her loan-origination claims are timely.
 24 Like fraud, the statute of limitations is three years. Hobbs v. Bateman Eichler, Hill
 25 Richards, Inc., 164 Cal. App. 3d 174, 201 (1985). Tarsha contends that her breach-of-
 26 fiduciary-duty claims sound in fraud and are therefore subject to the discovery rule.
 27 Even if this is true, Tarsha has not alleged sufficient facts to warrant application of that
 28 rule on the pleadings. See Part III.B.1. Nor does the more generous discovery rule
 arising out of fiduciary relationships cure her negligence in not discovering Defendants'

1 alleged frauds earlier. “Where a fiduciary relationship exists, facts which ordinarily
2 require investigation may not incite suspicion.” Hobbs, Cal. App. 3d at 201. But even
3 then, “[a] person in a fiduciary relationship may relax, but not fall asleep.” Alfaro v.
4 Cmty. Hous. Improvement Sys. & Planning Ass’n, Inc., 171 Cal. App. 4th 1356, 1394-
5 95 (2009). Tarsha still had a duty to investigate Rodriguez’s misconduct when “she
6 became aware of facts which would make a reasonably prudent person suspicious.”
7 Miller v. Bechtel Corp., 33 Cal. 3d 868, 875 (1983). At the very least, the fact that Mr.
8 Rodriguez claimed that it was unnecessary for Tarsha to review or sign her applications
9 should have warned Tarsha that something was very suspicious about her loans with
10 Countrywide. (SAC ¶ 53.) Moreover, a reasonable person would have inspected the
11 material terms of the loans upon signing, or shortly thereafter. See Part III.B.1.

12 Tarsha also argues that Defendants breached their fiduciary duty because they
13 failed to comply with the Making Home Affordable Refinance program (“HAMP”) by
14 failing to present her with viable options to modify her loans. (SAC ¶ 91.) Defendants
15 move to dismiss these “failure to modify allegations” because Tarsha cannot and does
16 not “allege that Defendants owed her a duty, fiduciary or otherwise, to grant her a loan
17 modification.” (MTD 10 (citing SAC ¶ 91).) The Court agrees with Defendants.

18 “Under HAMP, individual loan servicers voluntarily enter into contracts with
19 Fannie Mae, acting as the financial agent of the United States, to perform loan
20 modification services in exchange for certain financial incentives.” Vasquez v. Wells
21 Fargo Home Mortg., 2012 WL 985308 * 3 (S.D. Cal. March 22, 2012). “Participating
22 servicers are required to consider all loans eligible under the program; however, they are
23 not required to modify mortgages.” Id. (citing Escobedo v. Countrywide Home Loans,
24 Inc., 2009 WL 4981618, at *1 (S.D. Cal. Dec. 15, 2009). Defendants do not contest
25 that they entered into the HAMP agreement.

26 “Numerous district courts within the Ninth Circuit have ruled that there is no
27 express or implied private right of action to sue lenders or loan servicers for violation
28 of HAMP.” Cleveland v. Aurora Loan Serv., LLC, et al., 2011 WL 2020565, at *4
(N.D.Cal. May 24, 2011) (collecting cases); see also Carlos v. Bank of Amer. Home

1 Loans, et al., 2011 WL 166343, at * 1 (C.D.Cal. Jan.13, 2011) (“[I]t is well established
 2 that there is no private cause of action under HAMP”) (quoting Singh v. Wells Fargo
 3 Bank, 2011 WL 66167 at *7 (E.D.Cal. Jan.7, 2011)) (quotation marks omitted)).
 4 Because Tarsha has no private right of action against defendants under HAMP, her
 5 claim predicated on allegations that Defendants violated HAMP must be dismissed with
 6 prejudice.

7 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
 8 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
 9 the Court **GRANTS** Defendants’ motion to dismiss with respect to Tarsha’s loan-
 10 origination claims and her failure-to-modify claims **WITH PREJUDICE**.

11 12 3. *TILA Violations*

13 In her fourth cause of action, Tarsha alleges that Defendants failed to provide
 14 various disclosures required by TILA. (SAC 31-34.) Tarsha seeks monetary damages
 15 based on these claims. (*Id.* at ¶ 103.) These claims are time-barred.

16 Actions for TILA damages are subject to a one-year statute of limitations that
 17 begins to run on “the date of the occurrence of the violation.” 15 U.S.C. § 1640(e).
 18 The limitations period of a TILA damages claim may be tolled until the borrower
 19 discovers or had reasonable opportunity to discover the fraud or nondisclosures that
 20 form the basis of the TILA action. King v. California, 784 F.2d 910, 915 (9th Cir.
 21 1986).

22 A reasonably diligent person would have read the loans’ material terms upon
 23 signing, or, at a minimum, after receiving the loan documents. See Rey, * 5. Thus, it
 24 was not reasonable for Tarsha to wait until September 3, 2008 when she received the
 25 notice of default before first examining the loan papers and material loan terms. Id.;
 26 See Hubbard v. Fid.Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996). Therefore, Tarsha
 27 cannot claim that she was reasonably diligent in discovering the alleged TILA violations
 28 if she discovered them in 2010, five years after executing the transactions. (*Id.* at ¶
 103.) Moreover, to the extent that Tarsha attempts to toll the statute by way of her

1 repeated delayed discovery allegations, they fail as set forth above. See Part III.B.1.

2 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
3 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
4 the Court **GRANTS** Defendants' motion to dismiss Tarsha's TILA claims **WITH**
5 **PREJUDICE**.

6 7 4. *RESPA Violations*

8 In her fifth cause of action, Tarsha alleges that Defendants violated RESPA by
9 (1) not providing her with a loan servicing statement (12 U.S.C. § 2605(a)), (2)
10 overcharging her for "appraisal, closing costs, and other hidden fees" (12 U.S.C. §
11 2607), (3) and failing to properly respond to her Qualified Written Requests ("QWR")
12 (12 U.S.C. § 2605(e)). (SAC 36-37.) Again, Defendants move to dismiss Tarsha's
13 claim as untimely and inadequately pled. (MTD 13-15.)

14 Tarsha's RESPA claims under § 2605 are subject to a three-year statute of
15 limitations that begins to run on "the date of the occurrence of the violation." 12
16 U.S.C. § 2614. Tarsha's § 2607 claim for "unearned fees" is subject to a one-year
17 statute of limitations. 12 U.S.C. § 2614. Like TILA damages claims, RESPA claims
18 may be equitable tolled. Blaylock v. First Am. Title Inc. Co., 504 F. Supp. 2d 1091,
19 1106-08 (W.D. Wash. 2007). Tarsha's claims for failure to provide a servicing
20 statement and overcharging arise from the completion of her transactions with
21 Countrywide, more than four years before she filed her original complaint. (SAC 36-
22 37.) Tarsha essentially argues that the statute of limitations should be tolled because
23 Defendants concealed these violations by withholding required disclosures. (SAC ¶
24 107.) But the violation itself cannot serve to toll the statute of limitations; otherwise,
25 the statute of limitations is meaningless. See Garcia v. Wachovia Mortg. Corp., 676 F.
26 Supp. 2d 895, 906 (C.D. Cal. 2009) (finding the same in the TILA context). This
27 Court already explained that Tarsha must allege some "fraudulent conduct beyond the
28 nondisclosure itself" to justify equitable tolling. Id. However, Tarsha has essentially
realleged her concealment theory here. (SAC ¶ 107.) To the extent that she argues

1 that her delay was caused by her depression and not concealment, this Court finds her
2 equitable tolling argument unpersuasive as detailed above. See Part III.B.1. Because
3 general allegations of fraudulent concealment do not satisfy this pleading requirement,
4 Tarsha's servicing-statement and overcharging claims are time-barred as pled.

5 Tarsha's QWR claim alleges that Defendants did not properly respond to her
6 purported QWR by failing to provide the requested information, failing to make
7 corrections to the borrower's account, and failing to provide written notification of
8 correction. (SAC ¶ 111.) Defendants argue that this claim must be dismissed because
9 Plaintiff's purported QWR is not compliant with statutory requirements. (MTD 13-14.)
10 Defendants also move to dismiss this claim on the basis that their response to the
11 purported QWR met statutory requirements. (*Id.* at 14.) The Court agrees with
12 Defendants.

13 In order for correspondence to constitute a QWR, it must include "a statement
14 of the reasons for the belief . . . that the account is in error." 12 U.S.C.
15 §2605(e)(1)(B)(ii). Tarsha's purported QWR does not meet this threshold
16 requirement. Instead, the letter simply informs defendants that she disputes the
17 amount owed in her monthly billing statement without providing any detail as to the
18 reasons she believes the account is in error. (*Purported QWR* [Doc. 24-2] *Ex. P15* p. 1.)
19 Thus, Defendants were not required to respond to the purported correspondence,
20 effectively insulating them from liability for the claimed violation of the statute.
21 Moreover, Defendants argue that they provided a detailed, timely response that
22 complied with the statute and expressly contradicted her allegations of non-compliance.
23 (*See MTD 14; Response to Purported QWR* [Doc. 24-2] *Ex. P19*.) Tarsha does not refute
24 that her QWR was improper or that the Defendants response was improper anywhere
25 in her Opposition. (*See Opp'n* 36-39.)

26 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
27 was unable to do so, it appears leave to amend would be futile. In addition, Tarsha has
28 failed to refute Defendants' claims regarding the validity of her purported QWR. In

light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss Tarsha's RESPA claims **WITH PREJUDICE**.

5. *FDCPA & Rosenthal Act Violations*

In her sixth cause of action, Tarsha alleges that Defendants engaged in unlawful debt collection activities in violation of the FDCPA and Rosenthal Act. (SAC 38-41). Defendants move to dismiss Tarsha's claim as inadequately pled because Defendants are not "debt collectors" and because Tarsha fails to allege any improper debt collection activity. (MTD 15-17.) The Court agrees with Defendants that they are not "debt collectors" under the Rosenthal Act and the FDCPA.

The FDCPA does not govern efforts by creditors collecting their own debts. 15 U.S.C. § 1692a(6). Moreover, creditors, mortgagors and mortgage servicing companies are not "debt collectors" and are exempt from liability under the Act. Caballero v. Ocwen Loan Servicing, 2009 WL 1528128, at *1 (N.D. Cal. May 29, 2009). Because Defendants are a "loan servicer," no claim can be stated against them under the FDCPA.

Like the FDCPA, the RFDCPA applies only to debt collectors. Izenberg v. ETS Services, LLC, 589 F.Supp.2d 1193, 1199 (C.D. Cal. December 8, 2008). However, the definition of "debt collector" found in the state statute is broader than the FDCPA's definition. Id. The RFDCPA defines a "debt collector" as "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." See Cal. Civ. Code. § 1788.2(c). However, "[t]he law is clear that foreclosing on a deed of trust does not invoke the statutory protections of the [Rosenthal Act]." Sipe v. Countrywide Bank, 690 F.Supp.2d 1141, 1151 (E.D. Cal. 2010) (citations omitted); Izenberg, 589 F.Supp. 2d at 1199 ("foreclosure does not constitute debt collection under the Rosenthal Act"). Thus, no claim can be stated against Defendants under the Rosenthal Act.

Given the fact that Tarsha had a chance to cure the deficient pleadings here and was unable to do so, it appears leave to amend would be futile. In light of the foregoing,

1 the Court **GRANTS** Defendants' motion to dismiss Tarsha's FDCPA and Rosenthal
2 Act claims **WITH PREJUDICE**.

3
4 **6. California UCL Violations**

5 In her seventh cause of action, Tarsha alleges that Defendants violated
6 California's unfair competition law by engaging in the wrongful acts otherwise pled in
7 her previously discussed causes of action. (SAC 41-43.) California's UCL broadly
8 prohibits "any unlawful, unfair or fraudulent business act or practice and unfair,
9 deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. Because
10 § 17200 is written in the disjunctive, it establishes three varieties of unfair competition:
11 acts or practices that are (1) unlawful, (2) unfair, or (3) fraudulent. Cel-Tech
12 Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999). "Violation of
13 almost any federal, state, or local law may serve as the basis for a [UCL] claim."
14 Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008) (citing
15 Saunders v. Sup. Ct., 27 Cal. App. 4th 832, 838-39 (1994)). Defendants contend that
16 Tarsha's UCL claim is time-barred, inadequately pled, and fails to demonstrate an
17 "injury in fact." (MTD 17-19.) The Court agrees that the claim is time-barred and
18 inadequately plead.

19 An action for unfair competition under Business and Professions Code § 17200
20 shall be commenced within four years after the cause of action accrued. Bus. & Prof.
21 Code, § 17208. There is disagreement whether the "discovery rule" applies to unfair
22 competition actions. Compare Snapp & Associates Ins. Services, Inc. V. Malcome
23 Bruce Burlingame Robertson, 96 Cal. App. 4th 884, 891 (2002) (holding that the
24 discovery rule does not apply to unfair competition actions), with Aryeh v. Canon
25 Business Solutions, Inc., 55 Cal. 4th 1185, 1194-95 (Cal. 2013) (finding that the
26 discovery rule applies to UCL claims to the same extent it applies to any other statutory
27 claim and explaining that the application of the rule depends not on the cause of action
28 but the nature of the right sued upon).

1 If the discovery rule does apply, Tarsha's attempts to toll the statute of limitations
 2 fail as set forth above. See Part III.B.1. If the discovery rule does not apply, then "the
 3 statute begins to run ... irrespective of whether plaintiff knew of its accrual, unless
 4 plaintiff can successfully invoke the equitable tolling doctrine." Stutz Motor Car of
 5 America v. Reebok Intern., Ltd., 909 F.Supp. 1353, 1363 (C.D.Cal. 1995). As
 6 explained below, Tarsha cannot invoke the equitable tolling doctrine. See Part III.B.8.
 7 In either case, Tarsha's claims that are otherwise time-barred are time-barred under the
 8 UCL. Tarsha's claims which are not time-barred but are otherwise improper—alleged
 9 HAMP violations, RESPA claims in connection with the purported QWR, FDCPA
 10 claims, Rosenthal Act Claims—cannot serve as a basis for a UCL claim because they do
 11 not adequately allege any "unlawful," "unfair," or "fraudulent" business practices.

12 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
 13 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
 14 the Court **GRANTS** Defendants' motion to dismiss Tarsha's UCL claim **WITH**
 15 **PREJUDICE**.

16 17 *7. Breach of Good Faith*

18 In her eighth cause of action, Tarsha alleges that Defendants have breached the
 19 implied covenant of good faith and fair dealing by (1) failing to provide her with proper
 20 disclosures and misrepresenting her financial position in connection with the
 21 transactions, (2) self dealing to unjustly enrich themselves, (3) initiating foreclosure
 22 proceedings on her property and (4) failing to provide proper notices of that foreclosure.
 23 (SAC 44-45.) Defendants argue that Tarsha's eighth cause of action should be
 24 dismissed because it is time-barred and fails to allege a breach of contract. (MTD 19.)

25 "There is implied in every contract a covenant by each party not to do anything
 26 which will deprive the other parties thereto of the benefits of the contract. This
 27 covenant not only imposes upon each contracting party the duty to refrain from doing
 28 anything which would render performance of the contract impossible by any act of his
 own, but also the duty to do everything that the contract presupposes that he will do

1 to accomplish its purpose.” 1 WITKIN, SUMMARY 10TH CONTRACTS , § 798, p. 892
2 (2005). A breach of good faith claim sounds in contract, and thus has a four-year
3 statute of limitations. Frazier v. Metropolitan Life Ins. Co., 169 Cal. App. 3d 90, 102
4 (1985).

5 The alleged breaches of good faith surrounding the origination of the loans
6 occurred more than four years before Tarsha filed her claim. Because these claims fall
7 outside of the statute of limitations, and because Tarsha is not entitled to the discovery
8 rule, these claims are time barred. See Part III.B.1.

9 The alleged breaches of good faith regarding foreclosure fall within the statute
10 of limitations, because they allegedly occurred in 2008. However, Tarsha fails to plead
11 any wrongdoing on Defendants’ part in connection with these claims. Tarsha does not
12 dispute that she defaulted on her loan obligations, thereby empowering Defendants to
13 foreclose. (See FAC ¶140.) Therefore, Tarsha has not adequately plead that the
14 foreclosure was wrongful.

15 Tarsha’s allegations that Defendants failed to provide her with proper notice are
16 insufficient because actual receipt by the trustor of a notice of default is not required.
17 (SAC ¶140; Knapp v. Doherty, 123 Cal. App. 4th 76, 88 (2004) (“The trustor need not
18 receive actual notice of the trustee’s sale so long as notice is provided to the trustor that
19 is in compliance with the statute.”).) The judicially noticeable documents in this
20 matter show that Recontrust, the trustee identified on each of Tarsha’s deeds of trust,
21 recorded notices mandated by California’s non-judicial foreclosure system. Tarsha does
22 not explain why these are defective or provide any additional factual allegations to
23 support her claim. (See SAC 32-33) (incorporating allegations in her first seven claims,
24 but not from her wrongful foreclosure or quiet title causes of action.)

25 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
26 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
27 the Court **GRANTS** Defendants’ motion to dismiss Tarsha’s breach of good faith claim
28 **WITH PREJUDICE**.

1 8. *Equitable Tolling*

2 Tarsha's ninth cause of action again seeks equitable tolling of "all causes of action
3 alleged in [her] Second Amended Complaint." (SAC ¶ 142.) Defendant argues that
4 Tarsha provides no justification for equitable tolling of her claims. (MTD 20.) The
5 Court agrees.

6 "Equitable tolling is generally applied in situations 'where the claimant has
7 actively pursued his judicial remedies by filing a defective pleading during the statutory
8 period, or where the complainant has been induced or tricked by his adversary's
9 misconduct into allowing the filing deadline to pass.'" O'Donnell v. Vencor Inc., 466
10 F.3d 1104, 1112 (9th Cir. 2006) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89,
11 96 (1990)).

12 First, Tarsha makes no allegations that she actively pursued her judicial remedies
13 by filing a defective pleading during the relevant statutory period. (See SAC 142-148.)
14 Second, Tarsha fails to allege that she had been induced into allowing the filing
15 deadline to pass. (See *id.*) Third, to the extent that Tarsha contends that she was
16 unable to detect Defendants' wrongdoing due to Defendants' "fraudulent concealment,"
17 the Court is unpersuaded. See Part III.B.1. Accordingly, the equitable tolling doctrine
18 does not apply to save any of Tarsha's otherwise time-barred causes of action.

19 Given the fact that Tarsha had a chance to cure the deficient pleadings here and
20 was unable to do so, it appears leave to amend would be futile. In light of the foregoing,
21 the Court **GRANTS** Defendants' motion to dismiss Tarsha's equitable tolling claims
22 **WITH PREJUDICE.**

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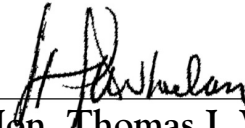
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1 **IV. CONCLUSION**

2 For these reasons, the Court **GRANTS** Defendants' motion to dismiss.

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4 **IT IS SO ORDERED.**

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6 **DATED: March 29, 2013**

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8 
9 Hon. Thomas J. Whelan
10 United States District Judge
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